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No. 87-167

IN THE

SUPREME COURT OF THE UNITED STATES

HARRIET MAREK AND SAMUEL MAREK,
WIFE and HUSBAND,

Petitioners

v.

MARPAN TWO, INC. and
BAHAMA CRUISE LINE, INC.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. COUNTER-STATEMENT OF THE CASE

A. *Procedural Background*

The Petition accurately states the procedural background of the case.

B. *Factual Background*

Respondent disputes the accuracy only of petitioner's statement that she was not afforded time to read the ticket before boarding the vessel. There was no such assertion in petitioner's affidavit submitted to the court

below, and there is therefore no basis in the record for such assertion.

II. ARGUMENT

A. *The Petition Should Not Be Granted Because There Is No Conflict In The Circuits As To The Controlling Legal Principles.*

The legal standard which has governed the rulings of the Courts of Appeals and the district courts with respect to enforcing contractual statutes of limitations for passengers' personal injury claims has not varied from circuit to circuit. Indeed, the distinction which petitioner seeks to draw between the Second Circuit's decision in *Silvestri v. Italia Societa Per Azione di Navigazione*, 388 F.2d 11 (2d Cir. 1968), and the standard adopted by the Third Circuit in this case is merely a semantic one. After Italia substantially revised its ticket in light of *Silvestri*, the Second Circuit concluded in *McQuillan v. Italia Societia Per Azione di Navigazione*, 386 F. Supp. 462, 465-466 (S.D.N.Y. 1974), (aff'd 516 F.2d 896 (2d Cir. 1975), that the new ticket satisfied *Silvestri*. In so doing, the Second Circuit expressly endorsed the same test applied by the Third Circuit in this case, i.e. whether the contract "reasonably communicates the importance of the terms and conditions to the passenger." *Id.*, 386 F. Supp. at 465-466.[1]

Furthermore, subsequent decisions of the district courts in the Second Circuit have applied the same

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1. Although the official citation suggests that the Second Circuit affirmed the decision of the district court in *McQuillan* without opinion, the actual order of affirmance states that the judgement was "affirmed on the opinion of Judge Werker, reported at 386 F. Supp. 462." *DeCarlo v. Italian Line*, 416 F. Supp. 1136, 1137 n.1 (S.D.N.Y. 1975).

standard of "reasonable communicativeness" which was applied by the Third Circuit in this case. See *Lieb v. Royal Caribbean Cruise Line, Inc.*, 645 F. Supp. 232 (S.D.N.Y. 1986), and *Cimini v. Italia Crociere International, S.P.A.*, 1981 A.M.C. 2674 (S.D.N.Y. 1981); *Raskin v. Compania de Vapores Realma*, 521 F. Supp. 337 (S.D.N.Y. 1981); *Ager v. D/S A/S DEN Norske Africa-Og Australielinie*, 336 F. Supp. 1187 (S.D.N.Y. 1972); *Lipton v. National Hellenic American Lines*, 294 F. Supp. 308 (E.D.N.Y. 1968).

The absence of any conflict in the circuits is further confirmed by the fact that the other circuits which have considered the same question have applied essentially the same standard. See *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983); *Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983); *Carpenter v. Klosters Rederi A/S*, 604 F.2d 11 (5th Cir. 1979). Thus, there is no conflict in the circuits which would justify granting the petition for certiorari in this case.

B. *The Petition Should Not Be Granted Because There Is No Substantial Federal Question Presented By This Appeal Which Should Be Settled By This Court.*

There is no important question presented by this appeal which requires resolution by this Court. The enforcement of the one year statute of limitations in passenger contracts has been expressly authorized as a general matter by act of Congress, 46 U.S.C. §183(b)(a). The legal standard to be applied in deciding whether the passenger receives sufficient notice of the contractual period of limitations — the standard of reasonable communicativeness — is the appropriate and most workable one. The Courts of Appeals and the district courts have been applying this standard for decades, producing results which square with fairness and common sense. There is no reason why this standard should be reviewed by this Court.

Nor does application of that standard to the facts of this case warrant review by this Court. The ticket contained repeated admonitions to the passenger to read the terms and conditions of the contract carefully. These warnings were adequate to reasonably communicate the statute of limitations to the petitioner, as numerous courts have held in similar circumstances. See *DeNicola v. Cunard Line, Ltd.*, 642 F.2d 5 (1st Cir. 1981); *Carpenter v. Klosters Rideri A/S*, 604 F.2d 11 (5th Cir. 1979); *Geller v. Holland-America Line*, 201 F. Supp. 508 (S.D.N.Y.) aff'd. 298 F.2d 618 (2d Cir. 1961).

Petitioner's subsidiary arguments that the warnings themselves must refer specifically to the statute of limitations and that she was given inadequate opportunity to review the contract are without merit. None of the existing caselaw requires an express reference in the warning to the statute of limitations clause or other "limitations on liability" of the carrier. Indeed, in view of the tickets' direction to the passenger to read *all* of the contract provisions, inclusion of specific terms in the warning would be surplusage at best and deceptive at worst.

The facts that the petitioner did not read the ticket and that it was retained by her friend are of no moment. The passenger who omits to read takes the risk of the omission. *Foster v. Cunard White Star, Ltd.*, 121 F.2d 12 (2d Cir. 1941). As a corollary of this, possession of the ticket by a friend is sufficient to charge the passenger with notice of its provisions. See *DeCarlo v. Italian Line*, 416 F. Supp. 1136, 1137 (S.D.N.Y. 1976); *Rogers v. Furness, Withy & Co.*, 103 F. Supp. 314, 316-317 (W.D.N.Y., 1951).

III. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RAWLE & HENDERSON

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CERTIFICATE OF SERVICE

Douglas H. Riblet, Esquire, attorney for respondents certifies that he served a copy of this brief in opposition to petition for writ of certiorari upon petitioner's attorneys, applied to Clyde W. Waite and Barry L. Gross, 547 East Washington Avenue, Newtown, Pennsylvania 18940 on the 28th of August, 1987, by regular U.S. Mail.

_____

Douglas H. Riblet, Esquire